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No.

In The

Supreme Court of the United States

October Term, 1981

DALLAS COUNTY HOSPITAL DISTRICT,
Petitioner,

vs.

DALLAS ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ISSUES PRESENTED

I.

WHETHER A HOSPITAL OWNED AND OPERATED BY A GOVERNMENTAL SUBDIVISION FOR THE SOLE PURPOSE OF TREATING HUMAN ILLS, IS A PUBLIC FORUM AVAILABLE TO MEMBERS OF THE GENERAL PUBLIC TO EXERCISE THEIR RIGHTS UNDER THE FIRST AMENDMENT.

II.

WHETHER PETITIONER'S "NO SOLICITATION" RULE REGULATING SOLICITATION ON HOSPITAL PROPERTY VIOLATES THE FIRST AMENDMENT.

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Your Petitioner[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of appeals for the Fifth Circuit, entered in the above cause on March 19, 1982, rehearing en banc and panel rehearing denied June 18, 1982.

[1]Petitioner, Dallas County Hospital District, (the District) is a political subdivision of the State of Texas created under Art. 4494n, Tex.Rev.Civ.Stat.Ann., to provide medical and hospital care to the medically indigent and needy persons residing in Dallas County, Texas, as well as to provide medical and hospital care to paying patients who need such care. The District owns and operates Parkland Memorial Hospital (Parkland).

OPINIONS BELOW

The majority opinion and the dissent of the United States Court of Appeals for the Fifth Circuit on rehearing were filed March 19, 1982, and are reported at 670 F.2d 629 (5th Cir. 1982), modifying prior opinion, affirming in part and reversing in part and remanding to District Court. A copy of the opinion is included in Appendix A., together with the Judgment dated March 19, 1982.

A copy of the Panel Opinion of the Fifth Circuit filed September 25, 1981, which was modified on rehearing, is included in Appendix B.

The Judgment of the United States District Court for the Northern District of Texas, Dallas Division, filed November 9, 1979, reported in 478 F.Supp. 1250, is included in Appendix C.

The Order of the United States Court of Appeals for the Fifth Circuit filed June 18, 1982, denying panel rehearing and suggestion of rehearing en banc is included in Appendix D.

The Order of the United States Court of Appeals for the Fifth Circuit filed August 9, 1982, granting motion to recall and stay the issuance of the mandate is included in Appendix E.

GROUNDS FOR JURISDICTION

The Judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on March 19, 1982, and is reported at 670 F.2d 629. Petitioner's motion for rehearing and suggestion for rehearing en banc were denied on June 18, 1982. This petition for certiorari was filed within ninety days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the Constitution of the United States
Art. 4494n, V.A.T.S.

STATEMENT OF THE CASE

The original complaint in this case was filed by Dallas Association of Community Organizations for Reform Now, Leon Gowans, and Scott Holladay, Respondents, in January, 1979, seeking injunctive relief from the enforcement of Petitioner's "no solicitation" policy, which prohibited Respondents from solicitations (handing out leaflets) on the Parkland Hospital premises.

Petitioner's answer asserted that Parkland Hospital was not a public forum and that the no solicitation policy properly prohibits Respondents from solicitations on Hospital premises without prior written approval of the Hospital Administrator. Petitioner further answered that other suitable alternative forums for conducting the solicitations were available to Respondents.

Parkland Hospital, one of the major hospitals in Dallas County, has facilities for emergency care, inpatient hospital care and outpatient care. (R. 110-P, 136)[2]. Many services are available at Parkland that are not available in other hospitals, such as a nationally known Burn Center. Therefore, Parkland attracts and serves many patients who can

[2]R. refers to the Record.

pay a portion or all of the costs of the medical and hospital services received by personal payment, insurance, Medicare, Medicaid, or other means. Former President John F. Kennedy was among those brought to Parkland as an emergency case. (R. 110-B, 110-C).

The hospital complex is surrounded by busy public streets. The vehicular access to the hospital is limited to three entrances. (A fourth entrance in the rear is to the emergency room). There is a patient parking lot on the grounds of the hospital, and a public parking lot across the street. Those patients who do not arrive by cars or taxis generally come by bus. There are three bus stops located on city property adjacent to the hospital. (R. 137). The hospital has three entrances for patients — the front lobby entrance for most patients being admitted to the hospital, the Outpatient Clinic entrance on the side for outpatients, and the Emergency Room entrance in the rear. ("A": 73-74)[3].

The Outpatient Clinic is a five story annex to the main part of the hospital. The clinic provides medical care to patients who are ambulatory, which usually means that they are well enough to walk in, receive care, and walk out. A majority of the patients served in the clinic are indigent. The clinic now treats many more patients than it was designed to accommodate; it is always extremely crowded. The clinic was designed for 400 patients a day; in 1978, the facility averaged 906 patients a day. Since the clinic was built in 1958, the number of patients treated there has increased on an average of 10% per year. A 1978 study projected future demand for the clinic and recommended a new ten story building to replace the current facility. (R. 136 & 146).

[3] "A" refers to the Transcripts of Proceedings.

The Outpatient Clinic has two entrances on the first floor, one from the front lobby and one from the outside. The heart of the first floor of the clinic is a small lobby, which contains an information desk on one side and the cashiers and prescription counters on the other side. Branching off the lobby are halls leading to the Triage Clinic, which diagnoses walk-in patients (those without appointments) and directs them to the appropriate area of the hospital, to the pharmacy, which has a large and crowded waiting room, to the Administrative Offices of the clinic and to the other portions of the hospital. At the end of the lobby opposite the entrance are the stairs and elevators providing access to the other floors of the clinic. The ground floor of the clinic contains numerous treatment rooms, a couple of small waiting areas and connecting hallways. The second, third, and fourth floors consist basically of a larger central waiting room surrounded by examination and treatment rooms. (R. 136; Def. Ex. 7-4 contains diagrams of the floor plans for the Outpatient Clinic.)

Health care personnel sometimes use the waiting rooms for activities related to patient care. These activities include teaching patients, counselling families, taking patient histories, and administering medication and I.V.'s. On rare occasions when the treatment rooms are full, some medical treatment, like drawing blood, occurs in the clinic waiting rooms. More commonly, the clinic waiting rooms, because of their size, are used for teaching patients. For example, instructions to diabetic patients are given in the clinic waiting rooms weekly. There are also classes in the clinic waiting rooms for obstetrics and cardiac patients. (R. 136).

The Respondents are Dallas Association of Community Organizations for Reform Now (ACORN), Scott Holladay, a prior Dallas Regional Organizer hired by the staff director

of ACORN in Little Rock, Arkansas, to organize activities in the Dallas area, and Leon Gowans, chairman of a neighborhood group affiliated with ACORN. (R. 110-A, 137). ACORN is an organization of low to moderate income families which operates through neighborhood groups to promote social and economic change. Families may become members in ACORN by paying membership dues which, to the extent available, are used to pay the salaries of ACORN staff personnel and other expenses. (R. 110-A, 137).

In 1967, the Board of Managers of the District adopted the no solicitation rule which is challenged in this suit. The rule states:

> "For the protection of our employees and patients, solicitation of any kind on hospital premises is prohibited without prior written approval of the Hospital Administrator."

The purpose of the no solicitation rule is to protect patients, their families and employees from potentially disruptive influences unrelated to the health care function of the hospital. Other hospitals have similar no solicitation rules. ("A". 166). Those hospitals with similar rules include Presbyterian and Baylor in Dallas and Massachusetts General.

The Board and the Administration interpret the no solicitation rule to prohibit distribution of literature on hospital property both inside and outside the buildings. (R. 113, 138). Since the adoption of the rule, no Administrator has approved the distribution of leaflets or pamphlets by any outside group. (R. 138).

The hospital Administration and staff believe that distribution of literature not related to health care would be disruptive and incompatible with the hospital's health care function. (R. 138).

On Saturday, September 2, 1978, approximately 45 ACORN members and staff attempted to stage a demonstration in the main lobby of the hospital without obtaining the approval of the Administrator. The demonstration was covered by two television stations, which had been notified in advance by ACORN that it would conduct the demonstration. (R. 110-C). While in the lobby, the ACORN group completely blocked the front entrance and no one could get through, thereby hindering the people trying to get out of the hospitl. ("A" 279, 304). An Administrator of the hospital requested that they leave and they did so. (R. 138).

On Monday, September 11, 1978, approximately six to eight ACORN members and staff entered the Outpatient Clinic and attempted to distribute leaflets, which implied that decent health care was not provided at Parkland, to people in the waiting rooms throughout the clinic. (R. 113, 139). The ACORN members were asked to leave by an Administrator and did so. (R. 138). However, before they left, one member of the group berated a secretary in a belligerent fashion and shook his finger in the face of the assistant director of the clinic and threatened to sue her. He acted in a very disruptive manner. ("A." 252, 254).

ACORN has demanded that it be allowed to distribute leaflets on the premises of Parkland without obtaining the approval of the Administrator. ACORN never submitted any materials to the Administrator for approval for distribution. (R. 114).

On November 8, 1979, the United States District Court for the Northern District of Texas, Dallas Division, held that Parkland Hospital is not a public forum for First Amendment activities and Respondents do not have a con-

stitutional right to solicit or to distribute leaflets at Parkland. In a footnote, the Court noted that:

> "The Board of Managers of the Defendant (Parkland) hold its monthly meetings at Parkland. The meetings are open to the public and members of the public, including plaintiffs, currently appear and speak. Nothing in this opinion is to be construed as affecting the open meeting policy of the Board." 478 F. Supp. 1250, at 1252-1253.

Unit A of the United States Court of Appeals for the Fifth Circuit on September 25, 1981, unanimously affirmed the trial court's opinion, holding that:

> " . . . the conditions at Parkland warrant the implementation of time, place and manner restrictions on First Amendment activity in even the nonpatient care areas of the hospital and outpatient clinic areas which might in a different hospital not interfere with the functions of providing care to the sick and injured." 656 F.2d 1175, 1180.

Referring to ACORN, the Court further held that:

> " . . . we do not find that it has shown a lack of suitable alternative forums for conducting its solicitations." 656 F.2d 1175, 1180.

On motion for rehearing, a majority of the Panel modified the prior opinion, affirmed in part and reversed and remanded in part, holding that:

> "We reverse both the District Court's finding that Parkland is not a public forum and its holding that Parkland's 'no solicitation rule' is constitutional." 670 F.2d 629, 633.

Judge Coleman dissented, noting that in the absence of a Supreme Court decision to the contrary, ". . . I would hold

that a hospital — designed, constructed and operated for the sole purpose of treating human ills — is not a public forum." 670 F.2d 629, 633.

Petitioner's motion for rehearing and rehearing en banc was denied June 18, 1982. (Appendix D). Petitioner's motion to stay was granted on August 9, 1982. (Appendix E).

REASONS FOR GRANTING WRIT

1. The Supreme Court of the United States should resolve the conflict existing in lower courts on whether a hospital, owned and operated by a governmental subdivision for the sole purpose of treating human ills, is a public forum.

2. The United States Court of Appeals for the Fifth Circuit erroneously reversed the district court holding that Petitioner's no solicitation rule regulating solicitation on hospital premises violates the First Amendment.

1. THE SUPREME COURT OF THE UNITED STATES SHOULD RESOLVE THE CONFLICT EXISTING IN LOWER COURTS ON WHETHER A HOSPITAL, OWNED AND OPERATED BY A GOVERNMENTAL SUBDIVISION FOR THE SOLE PURPOSE OF TREATING HUMAN ILLS, IS A PUBLIC FORUM.

Judge Coleman's dissenting opinion in the case at bar[4] would hold that a hospital — designed, constructed, and operated for the sole purpose of treating human ills — is not a public forum. The District Court held that Parkland Hospital is not a public forum for First Amendment activities and Respondents do not have a constitutional right to solicit or to distribute leaflets at Parkland.[5] This Court has made

[4] 670 F.2d 633, 634.

[5] 478 F.Supp. at 1252.

it clear that public property is not a public forum simply because it is publicly owned and has affirmed that the State, like a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. *Adderley v. State of Florida*, 385 U.S. at 47, 87 S.Ct. at 247.

The District Court in the case at bar noted that recent Supreme Court cases support a three step approach for analyzing freedom of speech cases.[6] The District Court noted that the steps are:

> (1) First determine if the activity is the type of speech protected by the First Amendment. If the activity is protected speech, the Court must next decide
>
> (2) Whether the proposed forum is a public forum; that is, whether it is an appropriate forum for the speech. If the Court concludes that the proposed forum is not a public forum, the analysis stops there. If the Court concludes that the area is a public forum, then
>
> (3) It must then balance First Amendment rights against the interest of the State in regulating the speech.

The District Court acknowledged that such an analytical framework is overlaid with well established principles of First Amendment law, including presumption against prior restraints, First Amendment guarantees are not absolute, and that a person does not have a constitutional right to speak whenever and however and wherever he or she pleases, citing *Adderley v. Florida*, 385 U.S. 39, 48, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); *Greer v. Spock*, 424 U.S. at 836, 96 S.Ct. 1211 (1976).

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[6] 478 F.Supp. 1250, at 1255 (1979)

After applying the three step analysis to the case at bar, the District Court concluded that ACORN's leafleting at Parkland Hospital is the kind of activity protected by the First Amendment and that if the activity took place in a traditional public forum, there would be no question of its propriety. The District Court noted that the question of whether or not Parkland Hospital is a public forum is decisive of the case and is one of first impression. After noting the importance of public ownership and public admittance, the District Court held that a place is not a public forum simply because it is publicly owned or because the public is permitted to be there and cited *Greer v. Spock*, supra, and *Adderley v. Florida*, supra.

The District Court considered both the historical test, as well as the realistic test (discussed by Justice Powell in the concurring opinion), and concluded that:

> "In the light of these cases, this Court concludes that a public hospital is not a public forum. There is no evidence in the record, and the Court can conceive of none, to show that a hospital has historically been a forum for any kind of protected speech. In fact, it is part of our history to regard the hospital as a haven sheltered from outside noise and activities." 478 F.Supp. 1250, at 1257.

The District Court further held that the realistic test likewise supports this conclusion and that:

> "Quality health care requires there be no impediment to the speed with which it is given and no disturbing influences on the patients. There is 'basic incompatibility' between leafleting in the public areas of a hospital and the rendition of health care." Id. 1257.

The Panel majority opinion held that the Board of the Hospital "...may not completely forbid freedom of speech on the Hospital grounds." 670 F.2d 629, at 632. However, the

Panel held this to be true only because the Hospital was held to be a public forum. When publicly owned property is not a public forum, the public has no right to exercise First Amendment guarantees on such property. See *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S.Ct. 2532 (1977); *Greer v. Spock*, 424 U.S. at 838, 96 S.Ct. at 1217; *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714 (1974); *Hudgens v. N.L.R.B.*, 424 U.S. at 520, 96 S.Ct. at 1036. Thus, the central issue of this case is whether a publicly owned hospital is a public forum for the exercise of First Amendment rights.

The public forum doctrine originates in the lead opinion of Justice Roberts in *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515, 59 S.Ct. 954, 964 (1939):

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

Respondents acknowledged in their brief in the Court of Appeals (page 10) that the areas of Parkland to which they seek access "have not traditionally been considered as public forums." Respondents, ignoring the "historical test" which was proposed by Judge Roberts in *Hague v. Committee for Industrial Organization*, supra, contended that "the realistic test as proposed in *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294 (1972), should be decisive of the public forum question." The Supreme Court of the United States emphasized the importance of the historical test in *Lehman v. City of Shaker Heights*, supra, and held that:

> "The truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place, you would have to know the history of the particular place." 418 U.S. at 302, 94 S.Ct. at 2717.

In *Greer v. Spock*, supra, the majority clearly opted for the historic test.

> "The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false." 424 U.S. at 838, 96 S.Ct. at 1217.

Similarly, in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, the Court stated, "A prison may be no more easily converted into a public forum than a military base." 97 S.Ct. at 2543. Thus, the Court affirmed that the historic test used in *Greer v. Spock* was the appropriate test to be used.

There is no historical basis for a notion that hospitals have traditionally served as a place for free public assembly and communication of thoughts by private citizens as is the case with municipal streets and parks. In describing public places that are not public forums, courts have specified hospitals, jails, and military bases. *United States v. Douglas*, 579 F.2d 545, 549, (9th Cir. 1978); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir. 1975); *ISKON v. Schrader*, 461 F.Supp. 714 (N.D. Tex. 1978); *Persons for Free Speech at SAC v. United States Air Force*, 675 F.2d 1010 (8th Cir. 1982).

The Court in *Persons for Free Speech at SAC*, supra, noted that:

> "The Supreme Court has rested its 'public forum' analysis on considerations of historical and traditional

uses of the relevant government property. See *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 117-120, 101 S.Ct. 2676, 2679, 69 L.Ed.2d 517 (1981) (mail boxes); *Greer v. Spock*, supra, 424 U.S. at 838, 96 S.Ct. at 1217 (military base); *Adderley v. Florida*, 385 U.S. 39, 41, 87 S.Ct. 242, 244, 17 L.Ed.2d 149 (1966) (jail). The question, therefore, is whether the open house is such a deviation from the historical and traditional uses of OAFB so as to create a public forum. We hold it is not." 675 F.2d at 1015.

Historically, hospitals have been regarded as havens to be sheltered from outside noises and activities. The historical restriction on hospital premises is also illustrated by hospital associations recommending that hospitals have rules prohibiting all solicitations and distribution of any type of literature by non-employees at any time on hospital premises. 11A Hospital Law Manual, Labor (update June 1979). Other hospitals, both locally and nationally, have no solicitation rules similar to that of the District. ACORN presented no evidence of any hospital making itself available as a public forum.

Respondents take a similar position to the position taken by the Court of Appeals in the *Spock* case, supra, where it held that military authorities could not prevent Dr. Spock and other persons from entering Fort Dix for the purpose of making political speeches or distributing leaflets in those areas of Fort Dix generally open to the public. The Court of Appeals based its decision on *Flower v. United States*, 407 U.S. 197, 92 S.Ct. 1842 (1972). The *Greer v. Spock* majority held that the *Flower* decision was based upon an understanding that Fort Sam Houston had abandoned any special claim to New Braunfels Avenue, which was a public thoroughfare in San Antonio no different from all the other public thoroughfares throughout the city. Therefore, the

Flower decision was held to have been merely an application of the rule stated by Justice Roberts in *Hague v. CIO*, 307 U.S. at 515-16, 59 S.Ct. 954.

The *Greer v. Spock* majority specifically rejected the concept of the Court of Appeals, which is advanced by ACORN in this case.

> "The Court of Appeals was mistaken, therefore, in thinking that the *Flower* case is to be understood as announcing a new principle of constitutional law, and mistaken specifically in thinking that *Flower* stands for the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for the purposes of the First Amendment. Such a principle of constitutional law has never existed, and does not exist now." 424 U.S. at 836, 96 S.Ct. at 1216.

Since even ACORN admits (although the Court of Appeals held otherwise), that a hospital is not historically a public forum, it seeks to draw the Court's attention away from the guidelines set forth in *Greer v. Spock* by arguing that the appropriate test is provided by the following sentence from *Grayned v. City of Rockford*. "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." 408 U.S. at 116, 92 S.Ct. at 2303. However, ACORN fails to appreciate the context of the situation when the Supreme Court made this statement in *Grayned*. The Supreme Court has frequently held that even when people seek to use a public forum to exercise their First Amendment rights, that use may be reasonably regulated as to time and place and manner. In *Grayned*, the Supreme Court was not considering whether to extend the reaches of the public forum doctrine to a place which had not historically been

a public forum. Instead, the *Grayned* opinion concerned whether the use of a city sidewalk, an historic public forum, should be limited because it was adjacent to a public school. Seen in that context, it is evident that the *Grayned* opinion does not establish a contrary test to that used by the Supreme Court in the later *Greer v. Spock* decision, but rather is an expression of the limitations that may be placed upon the use of public forums.

Moreover, even if one assumes in arguendo that the realistic test is a permissible alternative to the historic test, a hospital would still not be a public forum.

The purpose and primary activity of Parkland is rendering quality health care. (R. 142, "A" 232). Quality health care requires that there be no impediment to the speed with which the health care is given and no disturbing influences on the patients. The district court found that there is a basic incompatibility between leafleting in the public areas of the hospital and the rendition of health care. This incompatibility was found to arise both from the type of First Amendment activity — physical distribution of leaflets — and the possible detrimental effect on patients from the contents of the leaflets. Even the psychologist called by ACORN admitted that handing out leaflets could hinder the operation and efficiency of the hospital. ("A" 342).

Dr. Charles Mullins testified ("A" 127) there is an extremely high volume of traffic on the Hospital grounds with continuous traffic congestion that complicates the entire issue of trying to deliver health care and decrease waiting times. Dr. Mullins, a cardiologist, further stated that persons on the parking lot may have abnormal cardiac rhythm and literally a few seconds or a few minutes may be critical in getting the patient to the proper areas to be cared for. "And

if we congest those even worse, I think that is detrimental to health care." Dr. Mullins stated that on the 23 acres in addition to the many buildings, there are 3,200 employees and 500 doctors on the premises every day in addition to 2,000 patients and up to another 2,000 relatives of patients. He, therefore, was of the opinion that leafleting should not be permitted on the congested grounds of the Hospital.

This Court has referred to the need of hospitals to provide a tranquil atmosphere for patients. This recognition by the Supreme Court is best summed up by the following statement in *NLRB v. Baptist Hospital*, 99 S.Ct. at 2604n12.

> "12. Mr. Justice Blackmun has commented perceptively on the importance of maintaining a peaceful and relaxed atmosphere within hospitals.
>
> "'Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family — irrespective of whether that patient and that family are labor or management oriented — need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.' *Beth Israel Hospital v. NLRB*, supra, 437 U.S. at 509, 98 S.Ct. at 2478 (Blackmun, J. concurring)."

The *Baptist Hospital* case, supra, and *Beth Israel Hospital* case, supra, are instructive in demonstrating the atmosphere that should be provided for patients but they do not involve the constitutional guarantee of free expression. The rights and liabilities of the parties in those cases are dependent exclusively upon the National Labor Relations Act. This was made clear by the Supreme Court in an earlier decision in

Hudgens v. NLRB, 424 U.S. 507, 521, 96 S.Ct. 1029, 1037 (1976), where the Court stated, "we conclude, in short, that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this. From what has been said, it follows that the rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act."

It is obvious that the necessity to provide a tranquil atmosphere to patients recognized by the Supreme Court in these cases is totally incompatible with the concept of the public forum inviting conflict, anxiety and even anger.

Dicta in several cases supports the conclusion that a public hospital is not a public forum for First Amendment activity. The Supreme Court in *Lehman v. City of Shaker Heights*, 418 U.S. at 304, 94 S.Ct. at 2718, stated that the Constitution does not require that display cases in public hospitals become public forums open to every would be pamphleteer and politician. In *Grayned v. City of Rockford*, 408 U.S. 121n49, 92 S.Ct. at 2306, this Court stated "in *Tinker* we noted that 'a school is not like a hospital or a jail enclosure.'" Several lower courts have also specified hospitals in describing places that are not public forums. See *United States v. Douglas*, 579 F.2d 545, 549 (9th Cir. 1978); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir. 1975); *ISKON v. Schrader*, 461 F.Supp. 714, 718 (N.D.Tex. 1978).

Another case indicating that hospitals are not public forums is *Clifford v. Moritz*, 472 F.Supp. 1094 (S.D. Oh. 1979). Ohio MH-MR, a state agency which ran thirty-three hospitals throughout the state, had adopted a policy which permitted some but not all non-employee union organizers access to hospital grounds for the purpose of union solicitation in non-work areas. A union organizer not permitted

access to hospital grounds under the Ohio MH-MR policy brought suit claiming that the policy and its allegedly discriminatory application constituted an abridgement of his rights secured by due process and equal protection clauses of the Fourteenth Amendment. The court noted that unlike the sheriff in *Adderley v. Florida*, Ohio MH-MR did not seek to wholly prevent the use of hospital grounds for the exercise of protected expression by non-employees, rather it adopted a rule allowing some non-employees to engage in that activity, while prohibiting other non-employees from doing so. The court ruled that such a selective exclusion from a public place required a substantial if not compelling justification, which it did not find in that instance. However, the court went on to state that Ohio MH-MR "could bar non-employee solicitation altogether." 472 F.Supp. at 1100. Thus, the court recognized that a public hospital was not a public forum, but if a public entity opens the hospital up as a limited public forum, it must do so on a non-discriminatory basis.

In his concurring opinion in *Lehman v. City of Shaker Heights*, 418 U.S. at 305, 94 S.Ct. at 2718, Justice Douglas states that in his opinion the right of the commuters to be free from forced intrusion on their privacy "precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon its captive audience." Id. at 307, 94 S.Ct. at 2719. He concludes that the petitioner does not have any constitutional right to spread his message before this captive audience. If Lehman had no constitutional right to place his political placards in city buses due to the captive audience of its passengers, surely ACORN has no constitutional right to accost the captive audience of patients waiting for medical services at Parkland, nor to confront them on the hospital grounds and

add to the congestion which already exists at the hospital facility. If, therefore, Parkland is not a public forum, ACORN and its members have no right to access for the purpose of leafleting as distinguished from the purposes for which the premises were intended. *Persons for Free Speech at SAC v. United States Air Force*, supra.

Historically, hospitals have been operated under the same type policy that Parkland has. Dr. Charles Mullins testified ("A" 167-168) that he had been associated with other hospitals, including the one at Hickman Air Force Base in Hawaii and that, although they permitted magazines, newspapers and books on the premises, they each prohibited general solicitation.

This decision by the Panel of the United States Court of Appeals for the Fifth Circuit is the first case to hold that a hospital is a public forum. In order to prevent irreparable damage to our health care institutions, this Court should grant the petition for a writ of certiorari to the said United States Court of Appeals for the Fifth Circuit.

2. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRONEOUSLY REVERSED THE DISTRICT COURT HOLDING THAT PETITIONER'S NO SOLICITATION RULE REGULATING SOLICITATION ON HOSPITAL PREMISES VIOLATES THE FIRST AMENDMENT.

If Parkland is not a public forum, the no solicitation rule is clearly constitutional. *Greer v. Spock*, supra. Under the facts of this case, the rule is valid under the time, place and manner rule. The problem at Parkland was well summarized by Dr. Charles Mullins as follows:

> "...We consider that once a patient enters the property of Parkland hospital, that the patient is under our care

and we have to consider that patient's health needs, and these are both psychological and physical, of course. We have an extremely high volume of traffic and poor parking facilities at the moment, as you well know, and continuous traffic congestion, and I think adding to that simply complicates the entire issue of trying to deliver health care and decrease waiting times." ("A" 127).

As noted by the Court of Appeals, Parkland complex has three entrances for patients and is surrounded by busy public streets with vehicular traffic limited to three entrances with three bus stops located on city property adjacent to the hospital. 656 F.2d at 1176. ACORN could have stationed someone at each of these positions on city property and could have thereby reached every person that comes to Parkland. They could have also reached them by mail by securing a list from the hospital.

The Court of Appeals Panel in its first opinion found that, under these facts, "We determine that the conditions at Parkland warrant the implementation of time, place and manner restrictions on First Amendment activity in even the non-patient care areas of the hospital and outpatient areas which might in a different hospital not interfere with the functions of providing care to the sick and injured." 656 F.2d at 1180.

As pointed out by Judge Coleman in his dissent on rehearing, the prior opinion was limited to its facts and need not be extended beyond the actual issue in the case. He further stated that:

"Overworked, understaffed personnel of hospitals should not have their mission diverted by such stumbling blocks. No real First Amendment right is promoted by allowing it. The privacy of and a reasonably tranquil atmosphere for sick people, and the efforts to help them

if not always to cure them, ought not to be hampered by the necessity for specially tailored handling, which may survive the hair splitting analysis fostered by litigation. Let all propagandizers, of whatever purpose or ilk, stand clear of the last refuge of the sick." 670 F.2d at 633-634.

The access from City property was a reasonable alternative. First Amendment guarantees, however fundamental, are not absolute.

> "The guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.' *Adderley v. Florida*, 385 U.S. 39, 48, 87 S.Ct. 242, 247, 17 L.Ed.2d 149, 156." *Greer v. Spock*, 424 U.S. 828, 836, 96 S.Ct. 1211, 1216-17 (1976); see also *Cox v. State of Louisiana*, 379 U.S. 536, 554, 85 S.Ct. 453, 464 (1965).

There are times when First Amendment values must yield to other societal interests, *Metromedia, Inc. v. City of San Diego*, 101 S.Ct. 2282 (1981), and the facts show a rational basis for the rule.

The alternative access available at all Parkland entrances is better access than was approved (a single booth on fairgrounds) in *Heffron v. International Society for Krishna Consciousness*, 101 S.Ct. 2559 (1981).

The majority Panel on rehearing in the case at bar referred in a footnote to *NLRB v. Baptist Hospital*, 442 U.S. 773, 99 S.Ct. 2598 (1979), regarding *union* solicitation in a hospital. Other cases have come before the United States Supreme Court in the context of hospitals and union solicitation, most notably *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 98 S.Ct. 2463 (1978) and *NLRB v. Baylor University Medical Center*,

439 U.S. 9, 99 S.Ct. 299 (1978). None of these cases was concerned with First Amendment rights. Statutory rights were involved in each of those cases and they were decided exclusively upon the National Labor Relations Act and did not even discuss the First Amendment or the public forum issue. The Panel reliance on such cases was misguided. This distinction was made clear by the Supreme Court in an earlier decision in *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029 (1976), where the Court stated:

> "We conclude in short that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this. From what has been said, it follows that the rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act."

The Supreme Court has recognized a need to limit even those specific statutory rights when a hospital is involved even though it is employees who are to be solicited and not patients as in the case at bar. *NLRB v. Baptist Hospital*, supra.

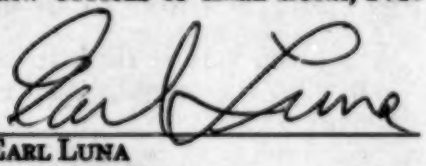
Therefore, while these NLRB cases are instructive in showing the sheltered atmosphere that needs to be provided to patients, they do not involve the constitutional guarantee of free expression, nor do they consider the issue of whether a hospital is a public forum.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.



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ATTORNEYS FOR PETITIONER

PROOF OF SERVICE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for petitioner herein in all proceedings in which they have been involved in the Courts below.

I further state upon oath that upon the 14th day of September, 1982, I served copies of the foregoing Petition for Writ of Certiorari on the Respondents by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Mr. Roger Albright, Mullinax, Wells, Baab & Cloutman, P.C., Suite 200, 8204 Elmbrook, Dallas, Texas 75247.

Earl Luna
EARL LUNA

SUBSCRIBED, AND SWORN TO before me by the said Earl Luna, this the 14th day of September, 1982.

Notary Public, Dallas County, Texas